No. 89-1348

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In The

Supreme Court of the United States

October Term, 1989

JONATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF MISSOURI SCHOOL BOARDS ASSOCIATION AND MISSOURI ASSOCIATION OF SCHOOL ADMINISTRATORS AS AMICI CURIAE OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Eighth Circuit correct to conclude that a rule concerning a wholly secular activity, absent any evidence of religious purpose either in its text or related to its enactment, cannot be held to violate either the purpose requirement or the primary effect test of *Lemon* solely because it is consistent with moral values which some school board directors and members of the community have attributed to religious beliefs?

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INTEREST OF AMICI CURIAE

Amicus curiae, Missouri School Boards Association (MSBA), is a not-for-profit corporation organized for the purpose of promoting public education and assisting locally elected boards of education in performing their lawful functions. The membership of the association represents more than ninety-five percent of the children attending public schools in the state of Missouri. It is the only statewide organization representing the interests of locally elected boards of education.

The MSBA is a delegate driven organization. Annually, representatives from each member district adopt a statement of mission and beliefs and resolutions to guide the activities of the association. The 1989-90 Mission and Beliefs includes the following statements:

> "The American tradition of separation of church and state must be maintained."
>
> "The autonomy of local boards of education is essential."

The Missouri Association of School Administrators is a not-for-profit corporation representing the interests of public school administration. Its membership is comprised of the public school administrators within the state. MASA annually adopts a statement of beliefs and resolutions to guide the activities of the association. Like MSBA, MASA is committed to both the separation of church and state and control of educational policy by locally elected officials, as shown in the following statements:

> "Separation of church and state must be maintained."
>
> "The autonomy of the local boards of education should be preserved. MASA Basic Beliefs, 1989-90.
>
> "MASA supports the maintenance of strong local control through duly elected boards of education." MASA Resolution E. 14, 1989-90.

Neither organization supports a policy prohibiting school dances. Neither organization believes that the appropriateness of such a policy is an issue in this case. While both organizations would adamantly oppose policies that violate the Establishment Clause, they are in agreement that locally elected school boards do not violate the Establishment Clause by continuing a policy regarding the extracurricular use of facilities that is neutral toward religion and which is consistent with the shared values of the community.

The strength of our system of locally elected educational policymakers is in its ability to respond to local values and concerns. If facially neutral policies that are consistent with prevailing community values can be converted into violations of the Establishment Clause because such values are commonly attributed to religious faiths, then school board members must evaluate not only policies, rules and their implementation, but also the religious beliefs of constituents in order to avoid violating the Establishment Clause. Such an analysis would produce absurd results, and would be unworkable in practice.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that Policy 502.29 of the Purdy R-II School District, prohibiting the use of school facilities for a school dance, does not violate the Establishment Clause of the First Amendment. Under the *Lemon* test, the policy has a secular purpose, and does not have the primary effect of advancing religion.[1]

[1] Only the purpose and effect components of *Lemon* will be discussed since the entanglement component has not been

(Continued on following page)

In order to fail the secular purpose test of *Lemon*, the Supreme Court has made it clear that a policy or law must be completely motivated by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, 1362 (1984).

The cases in which the Supreme Court has found a secular purpose lacking have involved challenges to laws or policies relating directly to primary religious activities and beliefs, such as the posting of the Ten Commandments, *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (per curiam); requiring a minute of silence for *prayer* and meditation, *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2579 (1985); devotional bible reading, *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) and biblical explanations of the origin of man and the world, *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968).

In contrast, Policy 502.29 relates to the use of facilities for extracurricular dancing – not an inherently religious or primary religious activity or belief. The finding of the trial court that the rule was "inherently religious to the Purdy R-2 School Board" is a *non-sequitur*. Appendix, Petition for Writ of Certiorari, 11. Hereinafter e.g. (A.11). An inherently religious rule would be so regardless of the particular board or circumstances surrounding its enactment. In addition, as the Eighth Circuit's opinion points out, the petitioners have conceded that extracurricular dancing is a secular activity, and there is no evidence of religious purpose in the text of the rule or related to its enactment. (A.22) The trial court relied instead on evidence of the

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preserved by petitioners under Rule 21.1(a), Rules of the Supreme Court of the United States.

religious beliefs of citizens and board members[2] to find evidence of a religious purpose. The Eighth Circuit correctly held that such evidence alone is insufficient to find a violation of the Establishment Clause.

> "We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions." (A.25)

It is an appropriate secular purpose for elected school board members to continue a policy which is consistent with the shared moral values of the community.[3] This is true regardless of whether patrons or board

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[2] Putting aside the issue of the propriety of evaluating official action based on individuals' religious beliefs, it is unclear what facts in the record served as the basis for the trial court's finding that the policy was inherently religious to the *board*. The trial court found as a fact that Garrett thought it might be time to change the rule, but feared "a lot of heat", Terry said he favored a change unless "controversy" resulted, and Stevens favored the change. (A.4, Finding of Fact 16) Since the facts do not even purport to show that more than half of the board's six members had personal religious beliefs against dancing, how could the *board* be shown to have personal religious motives to continue the rule. Three members do not constitute a quorum, and do not even account for a majority of a quorum of the full board. Section 162.301, RSMo., 1986. *Also see* Petition for Writ of Certiorari, pp. 13-14.

[3] The trial court noted in its Findings of Fact that a board member who voted to allow dancing at the school was defeated at the next election. (A.4) This finding underscores the secular interests of board members in being responsive to their constituents.

members themselves attribute such values to religious convictions, because moral values against the use of alcohol, pornography, pre-marital sex, provocative dress or abortion can likewise be attributed to religious views. Under the trial court's analysis, the district could not prohibit the use of its facilities under the Establishment Clause for extra-curricular programs on adolescent sexuality or abortion counseling if patrons and board members attributed their moral values against such programs to religious convictions.

Under the second part of the *Lemon* test, the Eighth Circuit's conclusion that the policy did not have the primary effect of advancing religion was also correct. As Judge Fagg pointed out in the opinion of the Eighth Circuit, the trial court relied on the same reasoning to conclude that the rule violated both the purpose and effect test of *Lemon*. (A.24) That reasoning was based on the religious backgrounds of board members and citizens. (A.24) Based on this reasoning the trial court found that "the primary effect of this rule is to endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful." (A.13)

The question under the primary effect test is whether the rule actually promotes or endorses religion. This test, adopted by the Court in *County of Allegheny v. ACLU*, ___ U.S.___, 109 S. Ct. 3086 (1989), was first described by Justice O'Connor as whether the practice "in fact conveys a message of endorsement or disapproval". *Lynch v. Donnelly*, 465 U.S. at 690, 104 S. Ct. at 1368. (O'Connor, J. Concurring)

In evaluating the display of a creche, as well as a Christmas tree and menorah in *County of Allegheny*, this Court agreed that the endorsement test is an objective evaluation of the message sent by the questioned practice, asking what people may "fairly understand" to be

the purpose given the context in which it occurs. *County of Allegheny*, ___U.S. at___, 109 S. Ct. at 3102. "Every governmental practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.*

Petitioners and the trial court would have this court believe that the proper context upon which to focus in this case is the fact that Purdy is a religious community where many people attribute their beliefs against dancing to religion, including *some* members of the board. However, this approach is subjective, and focuses exclusively on the religious aspects of the context. It ignores the secular motives of an elected public body responding to political debate on a moral issue in the community when a substantial majority have clearly stated their views. Given this context, it is hard to believe that an objective observer would perceive a "negative" imprimatur of preference for religion by the board based on the refusal to change a rule *prohibiting* a secular activity, neutral on its face, and without any evidence of religious motive related to its enactment. Petitioners' statement that the *board's* actions were contrary to the views of the superintendent and *at least* half of the board, in addition to being a contradiction in terms,[4] makes it even more difficult to draw such a conclusion. Petition for Writ of Certiorari, pp. 13-14.

Under such circumstances, the Eighth Circuit was correct to reject "the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action." (A.25) To hold otherwise would

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[4] The board cannot act except by a majority of a quorum, which is four members in this case. Section 162.301, RSMo., 1986.

require boards to inquire into the religious beliefs of constituents in order to evaluate their abilities to respond to public debate on many issues that arguably have a religious component. Boards would be required to reach different conclusions on the same rule depending on the religious makeup of the community.

The cases clearly illustrate that even where laws or rules have conferred much more direct benefits on religion, the Supreme Court has characterized the benefit to religion as remote, indirect or incidental. *Lynch v. Donnelly*, 465 U.S. at 681-683, 104 S. Ct. at 1363-1365.

Because the rule does not have a religious purpose and does not have the primary effect of endorsing religion, the Petition For Writ of Certiorari should be denied.

ARGUMENT

I. The Eighth Circuit correctly held that the continued enforcement of Policy 502.29 of the Purdy School District did not violate the religious purpose test of *Lemon*.

In determining whether a particular statute, policy or rule violates the Establishment Clause, the first consideration is whether the rule in question has a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111 (1971).

The question of what degree of religious influence is necessary to invalidate a law or policy has been repeatedly answered by this Court. For example, in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984), the Court considered a challenge to the presentation of a nativity scene by a city as part of its Christmas program. Chief Justice Burger, writing for the Court, 465 U.S. at 680, 104 S. Ct. at 1352, stated:

> "The court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was *no question* that the statute or activity was *motivated wholly by religious considerations.*" (emphasis added).

The Court used similar language to describe the secular purpose criterion of the *Lemon* test in striking down a state-mandated moment of silence for meditation and prayer:

> "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion . . . , the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985).

Likewise, the Court invalidated a requirement that the Ten Commandments be posted in public schools because they are plainly "religious in nature" and "do not confine themselves to arguably secular matters." *Stone v. Graham*, 449 U.S. 39, 41-42, 101 S. Ct. 192, 194 (1981) (per curiam).

The Court upheld the Adolescent Family Life Act against a claim that the Act's provision of funding to religiously affiliated organizations and prohibition against the use of such funds for family planning or the promotion of abortion services violated the Establishment Clause. *Bowen v. Kendrick*, ___U.S.___, 108 S. Ct. 2562 (1988). Chief Justice Rehnquist reaffirmed the Court's interpretation of the purpose prong of the *Lemon* test, stating for the Court ___U.S. at___, 108 S. Ct. at 2570:

> "Under the *Lemon* standard, which guides "[t]he general nature of our inquiry in this area," *Mueller v. Allen, supra*, 463 U.S. at 394, 103 S. Ct. at 3066, a court may invalidate a statute only if it is *motivated wholly* by an impermissible purpose, . ." (emphasis added).

Cases in which the Supreme Court has held that the purpose prong of *Lemon* was violated illustrate that a secular purpose was found lacking only when the statute or rule supported primary religious activities and beliefs such as prayer, devotional readings, religious concepts of creation or worship.

In *Stone v. Graham* (striking down the posting of the Ten Commandments in classrooms), the Court stated, 449 U.S. at 42, 101 S. Ct. at 194:

> "Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."

Justice Stevens, writing for the majority to overturn a required minute of silence in public schools for voluntary prayer and meditation in *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985), cited unequivocal testimony that the only legislative purpose of the act was to return voluntary prayer to the schools. He stressed, 472 U.S. at 56-57, 105 S. Ct. at 2490, that the state "did not present evidence of *any* secular purpose". In a footnote, Justice Stevens also cited the Fifth Circuit with approval, 472 U.S. at 44 n.22, 105 S. Ct. at 2483 n.22:

> "The Fifth Circuit has explained that prayer is a *primary religious activity* in itself . . . " *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools." (emphasis added).

Other cases in which the Court has found no secular purpose consistently focus on primary religious activities and beliefs: *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) (devotional reading of Bible and recitation of Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (recitation of prayer); *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266

(1968) (teaching of evolution forbidden because inconsistent with biblical view of origin of man). It is also notable that with the exception of *Epperson*, the rules invalidated as having religious purposes in these cases involve positive attempts to inculcate religious belief or to send an unequivocal message of endorsement. Although the law in *Epperson prohibited* teaching evolution it concerned a matter central to theology: the origins of man and the world. In addition, the prohibition directly affected existing curricula.

The no-dance rule is not an active inducement or endorsement of primary religious activities and beliefs such as prayer, devotional activities and worship. The rule cannot actively induce or endorse because it operates in the negative. The rule is morally based, and does not operate to influence the views of children on a subject so central to theology as the origins of the world. In addition, the rule does not affect curriculum in the Purdy R-II School District.

The finding of the trial court that the policy is inherently religious *to the Purdy R-II School Board* was a *non-sequitur.* (A.11) An inherently religious policy would be inherently religious regardless of the circumstances or the board of education which adopted the rule. Apparently the trial court characterized the no dance rule in this manner in order to place it in the same category as devotional prayer or the Ten Commandments, for which no secular purpose has been found by the Supreme Court.

The distinct qualitative differences between Policy 502.29 and the statutes and rules discussed in the foregoing cases which have been found to violate the purpose test are an indication that the policy is not wholly motivated by religion. However, it is not necessary to rely on a negative inference to establish a secular purpose in this case, since a clearly identifiable secular purpose exists.

There is no doubt that a relationship exists between strongly held moral values of members of the Purdy community, and the maintenance of the no-dance policy. As the Findings of Fact of the trial court indicate, individuals in the community attribute the moral value against dancing to their religious beliefs. (A.5-8)

However, as Judge Heaney observed in a case upholding a school board policy permitting observances of holidays having both a religious and secular basis:

> "Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its present purpose and effect is secular. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S. Ct. 1101, 1115, 6 L.Ed.2d 393 (1961). Thus although the rules permit the schools to observe holidays that have both a religious and secular basis, we need not conclude that the school board acted with unconstitutional motives." *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1313, 1315 (8th Cir. 1980), cert. denied 449 U.S. 987, 101 S. Ct. 409.

The Supreme Court has acknowledged on numerous occasions that the endorsement or promulgation of moral values that are religiously based does not necessarily violate the purpose prong of *Lemon*. As Justice O'Connor observed, concurring in *Wallace v. Jaffree*, 472 U.S. at 69-70, 105 S. Ct. at 2479:

> "A statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the establishment clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing." (O'Connor, J., Concurring).

The question under the first prong of the *Lemon* test as applied to this case is whether the continued enforcement of a policy preventing a discretionary extra-curricular activity in response to the conservative moral values of the community, which values are attributed by district patrons to their religious beliefs, is wholly motivated by religion.

When the issue is examined in the proper context, it is apparent that the motive of the *board* is essentially secular. It is entirely appropriate and expected that elected policymakers will adopt policies consistent with the moral climate of the community they represent. Board members need not insulate their decisions from the moral values of the community they represent simply because those values have religious overtones. To do so would effectively eliminate those groups from the political process. As the Eighth Circuit concluded: "In addition to its unrealistic nature this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular debate." (A.25-26) The question of whether the policy is a moral or religious issue cannot be a function of whether the value is anachronistic, or shared by the majority of citizens in the United States. The shared values of a majority of taxpaying citizens in a community are of obvious secular concern to elected public officials, whether those citizens attribute those values to religious beliefs or otherwise.

A similar issue was presented to the Supreme Court when it was claimed that the Hyde Amendment, which restricts use of Medicaid funds for abortions, advanced the beliefs of the Roman Catholic Church. *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980). In upholding the law, Justice Stewart wrote for the majority, 448 U.S. at 319, 100 S. Ct. at 1689:

> " . . . it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S. Ct. 1101, 1113, 6 L.Ed.2d 393."

The Court further observed, 448 U.S. at 319, 100 S. Ct. at 2689:

> "The Hyde Amendment is as much a reflection of the 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."

Although the trial court acknowledged in its Conclusions of Law that "the school board adopted the reasoning of the majority of townspeople, including the strongly held religious views" (A.12), it refused to evaluate the secular purpose issue in this context. Instead, the trial court and petitioners rely on this finding to prove an improper purpose.

However, as the Eighth Circuit held, since the rule concerns a secular subject and there is no evidence of a religious motive in its text or related to its enactment, evidence of personal religious beliefs of board members and citizens does not prove a religious motive.

> "First, plaintiffs conceded at oral argument that extracurricular dancing is a wholly secular activity . . . Further, the rule carries within its text absolutely no religious component, and there is not record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements." (A.22)

> "We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or the personal preferences of the officials taking action." (A.25)

In finding that there was no secular purpose for the no-dance rule, the trial court found that it was "particularly significant" that the district suspended and eventually abolished its policy permitting "outsider" rentals of the facilities. (A.13) Based on this fact, the court stated that it was clear that the secular reasons for the district's policy were pretextual. The fact that the district followed its policy is not evidence of pretext.[5] Secondly, the moral issue to the community is the same regardless of who organizes the school dance, and as discussed *supra*, this is a secular concern to elected policymakers. Regardless, it was not inappropriate to suspend outsider rentals in order to evaluate the application of the policy to such rentals. The trial court's conclusion of a pretextual purpose based on this fact was improper. *See Florey v. Sioux Falls School District*, 619 F.2d at 1315 (rejecting a similar inference).

II. The Eighth Circuit correctly held that the continued enforcement of Policy 502.29 of the Purdy School District did not have the primary effect of endorsing religion.

Even if a policy or statute has a secular purpose, the second part of the *Lemon* test requires invalidation if the primary effect is to advance or inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111 (1971). The trial court concluded that the primary effect of Policy 502.29 is to "endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful." The trial court further found that the policy placed "the state's imprimatur on one particular religious belief." (A.13-14)

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[5] The policy, by its terms, prevents school property from being used for any dance, regardless of sponsorship.

To support this conclusion, the trial court cited language in several cases decided by the Supreme Court. However, an examination of those very cases illustrates that the supposed benefit to religion in this case does not even come close to satisfying the primary effect test of *Lemon* as interpreted by the Supreme Court.

For example, the trial court cited the concurring opinion of Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. at 687-694, 104 S. Ct. 1366-1370, where she first proposed an "endorsement" test for Establishment Clause analysis later adopted by the Court in *County of Allegheny v. ACLU*, ___U.S.___, 109 S. Ct. 3086 (1989). Under this test, the relevant inquiry of the effect prong of the *Lemon* test is whether the practice "in fact conveys a message of endorsement of disapproval". *Lynch*, 465 U.S. at 690, 104 S. Ct. at 1368. (O'Connor, J. Concurring) The trial court purported to utilize this test in concluding that the state had placed its imprimatur on a religious belief.

It is notable that Justice O'Connor's endorsement test was satisfied in *Lynch* although the presentation of the nativity scene obviously had religious significance because it was not intended to endorse Christian beliefs. *Lynch v. Donnelly*, 465 U.S. at 692, 104 S. Ct. at 1369. It is hard to imagine that a rule prohibiting the use of school facilities for an optional extra-curricular activity, neutral on its face, could be held to be intended to endorse religious beliefs while a depiction of the birth of Christ does not, regardless of the context.

The trial court relied on evidence of the rule's correspondence with the personal religious beliefs of board members and citizens to show religious effect as well as purpose. (A.24) However it failed to apply the test as described in *County of Allegheny*. It is clear under both *Lynch v. Donnelly, supra*, and *County of Allegheny* that the

test evaluates the government's message objectively, asking what people may "fairly understand" to be the purpose, given the context. *County of Allegheny,* ___U.S. at ___, 109 S. Ct. at 3102. "Every governmental practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.*

The observations of the Eighth Circuit in reversing a district court decision that a public hospital chaplaincy program violated the secular purpose test in *Carter v. Broadlawns Medical Center,* 857 F.2d 449 (8th Cir. 1988), are also descriptive of the trial court's error in this case. 857 F.2d at 454:

> "The District Court in this case slipped into the same legal error made by the court in *Lynch v. Donnelly,* by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause, . . . ".

The trial court's evaluation was subjective, completely ignoring the obvious secular motives of an elected public body responding to political debate on a moral issue in a community where a substantial majority of citizens have clearly stated their views. The fact that citizens and *some* board members attributed their moral views to religious affiliations is but one factor. Other factors that should have been considered in evaluating the boards "action" to retain the rule are: 1) as petitioners concede, *at least* three board members, as well as the superintendent, supported changing the rule, but expressed concern about public reaction – i.e. "controversy" and "a lot of heat". Petition for Writ of Certiorari, pp. 13-14, Finding of Fact 16 (A.4); 2) the rule relates to a secular activity; 3) the rule operates in the negative, requiring the finding of a "negative" imprimatur; 4) religion was never presented to students as a basis for the

rule; 5) the text of the rule includes no religious component; and 6) substantial support for the rule existed in the community.

The secular aspect of elected officials failing to change an existing rule after substantial support was shown for the rule during vigorous public debate dwarfs the religious component of correspondence with religious beliefs in much the same way that the forty-five foot Christmas tree in *County of Allegheny* predominated over the otherwise religious effect of the menorah. *See County of Allegheny*, ___U.S. at ___, 109 S. Ct. at 3313.

In view of these facts, the Eighth Circuit was correct to reject "the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action." (A.25)

Any other conclusion would require elected officials to inquire into the religious beliefs of constituents in order to evaluate their abilities to respond to public debate on many issues that arguably include a religious component. Such inquiry would produce different results in different places for the same question depending on the religious makeup of individual communities. Although this court has strived for flexibility in applying the *Lemon* test, the trial court's interpretation in this case would cause too many inconsistent results.

The trial court cited *Wallace v. Jaffree*, 472 U.S. at 53 n.38, 105 S. Ct. at 2488 n.38, where James Madison's observations on the free exercise of religion are quoted, as support for its conclusion that the primary effect of the rule is to advance religion. However, in *Wallace* the Court never reached the primary effect test, concluding that the required minute of silence and voluntary prayer violated the secular purpose prong of *Lemon*. In any event, a rule

preventing the discretionary extra-curricular activity of conducting school dances cannot seriously be compared to a law requiring a minute of silence for prayer in terms of advancing religious beliefs.

The trial court also cited *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, 3226 (1985), to point out that the question of primary effect must consider the fact that children are in their formative years. But that case involved the use of public school teachers at public expense teaching in public programs at sectarian schools. The risk that parochial school children would perceive an endorsement under such facts cannot seriously be compared with the risk that students would perceive an imprimatur under Policy 502.29. School dances are not part of the curriculum. Students were never told that dancing is wrong, much less sinful.

The primary effect of advancing religion cannot be found where, as here, the benefit to religion is clearly "indirect, remote or incidental", *Lynch v. Donnelly*, 465 U.S. at 683, 104 S. Ct. at 1365; *Widmar v. Vincent*, 454 U.S. 263, 273-274, 102 S. Ct. 269, 276 (1981).

CONCLUSION

To focus exclusively on the religious aspects of a law or policy which reflects moral values without considering the secular context of political debate or shared community values is to enter the "twilight zone" of Establishment Clause analysis. This is particularly true where the rule concerns a secular activity, is secular on its face and includes no evidence of a religious purpose related to its enactment. The task of drawing the line between social mores and religious beliefs becomes even more treacherous if reliance is placed exclusively on evidence of

personal religious beliefs of citizens and elected officials in evaluating the issues of religious purpose and effect. This is why the Supreme Court has required laws to be lacking in any secular purpose to fail the purpose prong of *Lemon*, and why the Court has invalidated legislation only when it promotes primary religious activities or beliefs, such as prayer, worship, non-secular use of sacred writings, or religious doctrine concerning creation. Likewise, the need of elected officials to respond to constituents on issues relating to moral values which may correspond with religious beliefs is a good reason not to invalidate legislation, policies or practices under the primary effect test where the benefit to religion is indirect or remote, and eclipsed within the context of public debate on a public policy issue.

Under the trial court's analysis, a school district could be enjoined under the Establishment Clause from enforcing a custom, practice or policy preventing the use of its facilities for extra-curricular family planning clinics if patrons and board members attributed their views opposing such a use to their religious beliefs. The trial court's analysis would not be limited to the facts of this case. The fact that the stricken rule has few sympathizers or is seen as reactionary or even bad educational policy should not distract from the trial court's errors of law. Dancing adds glamour to this case, but is obviously not the real issue.

Policy 502.29 is secular on its face, operating only to prevent an otherwise optional extra-curricular secular activity on district property rather than actively attempting to instill a religious viewpoint. There is no evidence of religious purpose in its text or related to its enactment. The actions of the board in continuing the rule were essentially secular. The Eighth Circuit correctly concluded that under such circumstances, the evidence presented

of religious affiliations and beliefs of board members and constituents could not, as a matter of law, cause the rule to have a religious purpose or a primary effect or endorsing religion. Although Policy 502.29 may be consistent with the values and religious convictions of the Purdy community, it confers only a remote, indirect benefit, if any, on religion.

For the reasons stated, *amici curiae* Missouri School Boards Association and Missouri Association of School Administrators request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MISSOURI SCHOOL BOARDS ASSOCIATION
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